UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

CHRISTINE BROWN,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Civil No. 06-60-B-H***
	)	
EASTERN MAINE	***)***	
MEDICAL CENTER,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

Eastern Maine Medical Center ("EMMC") moves for summary judgment as to the sole remaining count against it (alleging violation of the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 *et seq*.) in this lawsuit brought by former EMMC employee Christine Brown. *See* Defendant's Motion for Summary Judgment, etc. ("Defendant's S/J Motion") (Docket No. 25) at 1-2; Complaint and Demand for Jury Trial ("Complaint") (Docket No. 1) ¶¶ 17-23.[1] For the reasons that follow, I recommend that the motion be granted.

I. Summary Judgment Standards

A. Federal Rule of Civil Procedure 56

Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c);

[1] Brown alleged that EMMC's actions violated both the FMLA (Count I) and the Maine Family Medical Leave Act ("MFMLA"), 26 M.R.S.A. § 843 *et seq*. (Count II). *See generally* Complaint. The court granted EMMC's motion to dismiss Brown's MFMLA claim (Count II). *See* Recommended Decision on Motion To Dismiss (Docket No. 8) at 1; Order
(*continued on next page*)

Santoni v. Potter, 369 F.3d 594, 598 (1st Cir. 2004). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party.'" *Navarro v. Pfizer Corp.*, 261 F.3d 90, 93-94 (1st Cir. 2001) (quoting *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995)).

The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Santoni*, 369 F.3d at 598. Once the moving party has made a preliminary showing that no genuine issue of material fact exists, the nonmovant must "produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue." *Triangle Trading Co. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) (citation and internal punctuation omitted); Fed. R. Civ. P. 56(e). "As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party." *In re Spigel*, 260 F.3d 27, 31 (1st Cir. 2001) (citation and internal punctuation omitted).

B. Local Rule 56

The evidence the court may consider in deciding whether genuine issues of material fact exist for purposes of summary judgment is circumscribed by the Local Rules of this District. *See* Loc. R. 56. The

Adopting Report and Recommended Decision (Docket No. 15).

moving party must first file a statement of material facts that it claims are not in dispute. *See* Loc. R. 56(b). Each fact must be set forth in a numbered paragraph and supported by a specific record citation. *See id*. The nonmoving party must then submit a responsive "separate, short, and concise" statement of material facts in which it must "admit, deny or qualify the facts by reference to each numbered paragraph of the moving party's statement of material facts[.]" Loc. R. 56(c). The nonmovant likewise must support each denial or qualification with an appropriate record citation. *See id*. The nonmoving party may also submit its own additional statement of material facts that it contends are not in dispute, each supported by a specific record citation. *See id*. The movant then must respond to the nonmoving party's statement of additional facts, if any, by way of a reply statement of material facts in which it must "admit, deny or qualify such additional facts by reference to the numbered paragraphs" of the nonmovant's statement. *See* Loc. R. 56(d). Again, each denial or qualification must be supported by an appropriate record citation. *See id*.

Failure to comply with Local Rule 56 can result in serious consequences. "Facts contained in a supporting or opposing statement of material facts, if supported by record citations as required by this rule, shall be deemed admitted unless properly controverted." Loc. R. 56(e). In addition, "[t]he court may disregard any statement of fact not supported by a specific citation to record material properly considered on summary judgment" and has "no independent duty to search or consider any part of the record not specifically referenced in the parties' separate statement of fact." *Id*.; *see also, e.g., Cosme-Rosado v. Serrano-Rodriguez*, 360 F.3d 42, 45 (1st Cir. 2004) ("We have consistently upheld the enforcement of [Puerto Rico's similar local] rule, noting repeatedly that parties ignore it at their peril and that failure to present a statement of disputed facts, embroidered with specific citations to the record, justifies the court's deeming the facts presented in the movant's statement of undisputed facts admitted.") (citations and internal punctuation omitted).

II. Discussion

Brown, who began working for EMMC as a nursing technician in about June 2002, was fired on November 3, 2005 for excessive work-rule violations related to tardiness. *See* Defendant's Statement of Undisputed Material Facts ("Defendant's SMF") (Docket No. 26) ¶¶ 1, 93-94; Plaintiff's Reply to Defendant's Statement of Material Facts and Statement of Material Facts in Support of Plaintiff's Opposition to Defendant's Motion for Summary Judgment ("Plaintiff's Opposing SMF") (Docket No. 40) ¶¶ 1, 93-94. She worked a 6:30 a.m. to 7 p.m. schedule three days a week at EMMC. *See id*. ¶ 3. The termination notice listed eight dates in August, September and October 2005 on which she was late for the 6:30 a.m. start of her shift. *Id*. ¶ 94. Brown alleges that EMMC interfered with, restrained her exercise of, and/or denied her rights under the FMLA when it failed to inform her of her right to take intermittent leave and failed to designate various periods when she was late to work as intermittent leave. *See* Plaintiff's Opposition to Defendant's Motion for Summary Judgment ("Plaintiff's S/J Opposition") (Docket No. 39) at 1; Complaint ¶¶ 5-23.

EMMC seeks summary judgment on three alternative grounds: that there is no evidence that (i) Brown had a serious health condition that made her unable to perform the functions of her position, (ii) Brown had a medical necessity for intermittent leave, or (iii) EMMC interfered with, restrained or denied any exercise or attempted exercise of her leave rights. *See* Defendant's S/J Motion at 1. Inasmuch as I conclude, for reasons discussed below, that Brown has failed to set forth cognizable evidence with respect to a critical threshold element of her case – that she was entitled to the disputed FMLA leave – I refrain from reciting in any great detail the evidence that is cognizable. I need not, and do not, address the alternative basis on which EMMC seeks summary judgment: that it did not interfere with, restrain or deny Brown's exercise or attempted exercise of leave rights. *See id.*

The parties agree that to make out a *prima facie* case of interference with FMLA rights, a plaintiff must demonstrate, *inter alia*, that he or she was entitled to the disputed leave. *See* Defendant's S/J Motion at 11; Plaintiff's S/J Opposition at 10; *see also, e.g., Colburn v. Parker Hannifin/Nichols Portland Div.*, 429 F.3d 325, 331 (1st Cir. 2005) ("Claims for violations of substantive [FMLA] rights are brought under 29 U.S.C. § 2615(a)(1), which prohibits actions by any employer to interfere with, restrain, or deny the exercise of such rights. To meet his or her burden in an interference with substantive rights claim, a plaintiff need only show, by a preponderance of the evidence, entitlement to the disputed leave; no showing as to employer intent is required.") (citations and internal quotation marks omitted); *Jones v. Denver Pub. Sch.*, 427 F.3d 1315, 1319 (10th Cir. 2005) (to make out *prima facie* claim for FMLA interference, plaintiff must establish "(1) that he was entitled to FMLA leave, (2) that some adverse action by the employer interfered with his right to take FMLA leave, and (3) that the employer's action was related to the exercise or attempted exercise of his FMLA rights."); *Bailey v. Miltope Corp.*, No. 2:05-cv-1061-MEF, 2007 WL 60928, at *5 (M.D. Ala. Jan. 8, 2007) ("In order to state a claim that his employer has interfered with a substantive FMLA right, a plaintiff must demonstrate that he was entitled to the benefit denied.").

As EMMC points out, *see* Defendant's S/J Motion at 11, to demonstrate entitlement to FMLA leave, Brown must show that she had "a serious health condition that ma[de] [her] unable to perform the functions of [her] position[,]" 29 U.S.C. § 2612(a)(1)(D). An employee is considered unable to perform the functions of her position "where the health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's position[.]" 29 C.F.R. § 825.115. "An employee who must be absent from work to receive medical treatment for a serious health condition is considered to be unable to perform the essential functions of the position during the absence for treatment." *Id*. In turn, entitlement to intermittent FMLA leave hinges on whether such leave is "medically

necessary." *See, e.g.*, 29 U.S.C. § 2612(b)(1) ("leave under subparagraph (C) or (D) of subsection (a)(1) of this section may be taken intermittently or on a reduced leave schedule when medically necessary"); 29 C.F.R. § 825.203(c) ("Leave may be taken intermittently or on a reduced leave schedule when medically necessary for planned and/or unanticipated medical treatment of a related serious health condition by or under the supervision of a health care provider, or for recovery from treatment or recovery from a serious health condition."); *id*. § 825.117 ("For intermittent leave or leave on a reduced leave schedule, there must be a medical need for leave (as distinguished from voluntary treatments and procedures) and it must be that such medical need can be best accommodated through an intermittent or reduced leave schedule.").

Brown adduces evidence that she was suffering from symptoms of fatigue and depression of unknown origin, seeing several doctors and searching for a definitive diagnosis during the time she was employed at EMMC. *See* Plaintiff's Statement of Material Facts in Support of Plaintiff's Opposition to Defendant's Motion for Partial Summary Judgment ("Plaintiff's Additional SMF"), commencing at page 17 of Plaintiff's Opposing SMF, ¶¶ 8-9, 11; Deposition of Christine Brown ("Brown Dep.") (Docket No. 27) at 44, 54, 76-77, 96, 109; Exh. 2 to Declaration of Jeffrey Neil Young ("Young Decl.") (Docket No. 41). She also adduces evidence that, at various points in 2005, she told EMMC supervisors she was tardy or absent because she was sick, depressed or fatigued. *See* Plaintiff's Additional SMF ¶¶ 35, 54; Brown Dep. at 34, 44- 46; *see also* Plaintiff's Additional SMF ¶¶ 43, 63-65; Plaintiff's Additional Statement of Material Facts and Defendant's Responses Thereto ("Defendant's Reply SMF"), commencing at page 49 of Consolidated Statement of Undisputed Material Facts ("Defendant's SMF Objections") (Docket No. 44), ¶¶ 43, 63-65. However, it is undisputed that:

1. Brown never arrived late to work in the morning because she was actually getting medical treatment. *See* Defendant's SMF ¶ 95; Plaintiff's Opposing SMF ¶ 95.[2]

2. No doctor ever told her it was medically necessary for her to be late for work because of her depression. *See id*. ¶ 97.

3. No doctor ever told her the whole time she worked at EMMC that it would be medically necessary for her to be late for work for any reason. *See id*. ¶ 98.

4. None of her medical providers during the time she worked at EMMC between June 2002 and November 3, 2005 told her she had a serious health condition that made it medically necessary for her to be late for work. *See id*. ¶ 99.[3]

5. No medical provider told her it was medically necessary for her to be out of work except for a Dr. Bragg, who gave Brown a note dated August 3, 2005 stating that she was under medical supervision and would be out of work until Monday, August 8, 2005; the reason given was fatigue. *See id.* ¶¶ 100, 102.[4] When those few days were over, Brown was able to return to work. *See id*. ¶ 103.[5]

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[2] Brown purports to qualify this statement by asserting that, while she never was late to work because of a doctor's appointment, "getting medical treatment" could encompass her chronic condition, for which she was receiving treatment and which Dr. Krause ultimately diagnosed as a connective-tissue disorder. *See* Plaintiff's Opposing SMF ¶ 95. I sustain EMMC's objection to this response on the ground that it represents a legal argument (and a weak one, at that) rather than a responsive fact. *See* Defendant's SMF Objections ¶ 95.

[3] Brown qualifies paragraphs 97 through 99, asserting that after her termination, she saw a Dr. Krause, who stated in writing that it was medically necessary for her to be late to work because of a connective-tissue disorder. *See* Plaintiff's Opposing SMF ¶¶ 97-99. EMMC objects to those qualifications on, *inter alia*, hearsay grounds. *See* Defendant's SMF Objections ¶¶ 97-99. The Krause letter, which I conclude is inadmissible to prove the truth of its contents, is discussed below.

[4] Brown adds that Dr. Bragg gave her a note not only in August 2005 but also in January 2005. *See* Plaintiff's Opposing SMF ¶ 100. Specifically, on or about January 18, 2005 Brown provided Zina Black, nurse manager of the unit on which Brown worked, with a note from Dr. Bragg taking Brown out of work for two days and stating she was "under medical supervision." Plaintiff's Additional SMF ¶ 33; Defendant's Reply SMF ¶ 33; *see also* Defendant's SMF ¶¶ 2, 11; Plaintiff's Opposing SMF ¶¶ 2, 11.

[5] Brown points out that, although she returned to work "all right," she sought further treatment for fatigue prior to her termination. *See* Plaintiff's Opposing SMF ¶ 103; Brown Dep. at 96-97.

6. If EMMC had told Brown she could come in late to work as long as a doctor said it was medically necessary for her to come in late to work because of a serious health condition, Brown would not have been able to provide that material from any of the doctors she had seen up to the date of her termination. *See id*. ¶ 119.[6]

The only evidence Brown presents, apart from her own testimony, that her health condition either rendered her unable to perform the functions of her position or necessitated intermittent leave is a January 5, 2006 letter from treating physician Donald W. Krause, M.D., to her counsel. *See* Plaintiff's Additional SMF ¶¶ 15, 85; Letter dated January 5, 2006 from Donald W. Krause, M.D. to Attorney Jeff[rey] [Neil] Young ("Krause Letter"), attached as Exh. 1 to Young Decl. Brown was first treated by Dr. Krause, a rheumatologist, on December 22, 2005. *See* Defendant's SMF ¶ 126; Plaintiff's Opposing SMF ¶ 126. The visit to Dr. Krause was scheduled prior to Brown's termination from EMMC, and Brown told Black prior to her termination that she was going to see Dr. Krause. *See id*. ¶¶ 127-28. In his January 5, 2006 letter, Dr. Krause stated, in relevant part:

> I saw Christine Brown on December 22, 2005 for her first visit. For the past year she has had a connective tissue disorder associated with profound fatigue, weakness and lethargy, to a degree that made it impossible for her to continue the functions of her job, or to arrive at work on time. Apparently because of this, she was fired from her job.
>
> I believe the profound fatigue and weakness are related to a medical disorder which is not yet completely understood or adequately treated.

Krause Letter. As of March 29, 2006 Dr. Krause had never told Brown that she had a serious health condition that made it necessary for her to be late for work. *See* Defendant's SMF ¶ 129; Plaintiff's

[6] Brown qualifies this paragraph, like earlier paragraphs, with reference to the fact that she eventually saw Dr. Krause, who generated a letter supporting the medical necessity of her tardiness to work. *See* Plaintiff's Opposing SMF ¶ 119. EMMC objects to that qualification. *See* Defendant's SMF Objections ¶ 119. The Krause letter is discussed below.

Opposing SMF ¶ 129. Dr. Krause never told Brown that her undifferentiated connective-tissue disorder made it medically necessary for her to be late to work. *See id*. ¶ 130.[7]

EMMC objects to the Krause Letter and requests that it be stricken, or at least excluded as proof of the truth of the assertions therein, on grounds that (i) it is an unsworn statement not accompanied by a sworn affidavit from the physician and, as such, is inadmissible hearsay under Federal Rule of Evidence 801(c) and 802, (ii) it does not fall within the hearsay exception in Federal Rule of Evidence 803(4) for "statements for purposes of medical diagnosis and treatment[,]" (iii) it does not fall within the business-records exception of Federal Rule of Evidence 803(6), and (iv) it lacks the foundation required by Federal Rule of Evidence 602 inasmuch as Dr. Krause did not begin treating the plaintiff until December 22, 2005, more than a month following her termination, and has no basis to conclude from personal knowledge that absences from work that took place during the prior year were related to a medical condition he only suspected she had, and the unsworn letter does not constitute expert testimony under Federal Rule of Evidence 702. *See* Defendant's SMF Objections ¶ 95.[8]

Brown tenders a response to this objection (as well as other EMMC objections) accompanied by a new affidavit of her counsel and an affidavit of Dr. Krause. *See* Plaintiff's Reply to Defendant's Objections to Plaintiff's Response to Defendant's Statement of Material Facts and to Defendant's Objections to Plaintiff's Additional Statement of Material Facts ("Plaintiff's Response to SMF Objections") (Docket No. 47); Second Declaration of Jeffrey Neil Young ("Second Young Decl.") (Docket No. 46); Affidavit of Dr.

[7] Although Brown purports to qualify and deny paragraphs 129-30 by stating that, while Dr. Krause did not tell her those things, he indicated the substance of that opinion in his January 5, 2006 letter, she effectively admits the underlying statements. *See* Plaintiff's Opposing SMF ¶¶ 129-30.

[8] EMMC incorporates this objection by reference in its responses to other paragraphs of the Plaintiff's Opposing SMF and the Plaintiff's Additional SMF that rely at least in part on citation to the Krause Letter. *See* Defendant's SMF Objections ¶¶ 96-99, 119, 129-30; Defendant's Reply SMF ¶¶ 9, 11, 15, 61, 85.

Donald W. Krause, M.D. ("Krause Aff.") (Docket No. 45). In his second declaration Young states, *inter alia*, that prior to filing his opposition to the defendant's summary-judgment motion he contacted Frank McGuire, counsel to EMMC, and inquired whether it was necessary to obtain certification of medical records, in particular as regarded the Krause Letter; McGuire responded that he would not object to the Krause Letter under Federal Rules of Evidence 901 or 1003 but that he was reserving objections on other grounds; and Young understood, based on that exchange, that the defendant "reserved objections, for example, to the fact that the letter was received after my client was terminated by EMMC . . ., but did not understand that [McGuire] would object on the basis that the letter was not offered as part of an affidavit or because he did not consider the January 5, 2006 letter to be part of Plaintiff's medical records." Second Young Decl. ¶¶ 2-4. Young states that, although it was his understanding that the agreement between counsel had "taken care of" the issues delineated in the objection raised by EMMC, he addresses that objection by submitting a sworn affidavit of Dr. Krause that incorporates the letter, reiterates its content and amplifies upon it. *See id*. ¶¶ 6-8.

With that as backdrop, Brown argues that the Krause Affidavit resolves the dispute over admissibility of the Krause Letter and, if not, the Krause Affidavit itself provides competent evidence to support her responses. *See* Plaintiff's Response to SMF Objections at [2]. She contends that EMMC's remaining objection – that the Krause Letter is without foundation because Dr. Krause did not see her during the relevant time period – goes to the weight, rather than the admissibility, of the letter. *See id.*

Brown's amendment of her evidence comes too late. Local Rule 56(e) states, in relevant part: "A party may respond to a request to strike . . ., if the request was made in a reply statement of material facts, by filing a response within 11 days. A response to a request to strike shall be strictly limited to a brief statement of the reason(s) why the statement of fact should be considered and the authority or record

citation in support." Loc. R. 56(e). As this court has construed that rule, "the ability afforded by Local Rule 56 to respond to an evidentiary objection does not constitute an invitation to tender new evidence or record citations omitted – inadvertently or otherwise – from a statement of material facts." *Colt Defense LLC v. Bushmaster Firearms, Inc.*, No. Civ. 04-240-P-S, 2005 WL 2293909, at *11 n.60 (D. Me. Sept. 20, 2005) (rec. dec., *aff'd* Feb. 22, 2006), *aff'd*, 486 F.3d 701 (1st Cir. 2007).

While, in this case, Brown offers an excuse for her tardy proffer of evidence – namely, that her attorney believed an agreement between counsel had forestalled any objection such as those actually raised – it is not a compelling one. E-mails exchanged between Young and McGuire, attached to the Second Young Declaration, make clear that McGuire agreed only that EMMC would lodge no objection based on authentication or authenticity grounds pursuant to Federal Rules of Evidence 901 or 1003. *See* Exh. A to Second Young Decl. As promised, EMMC lodged no such objection. *See* Defendant's SMF Objections ¶ 95. The agreement between counsel left EMMC free to interpose hearsay, among other, objections. *See Yongo v. INS*, 355 F.3d 27, 31 (1st Cir. 2004) ("Of course, once the documents were admitted, a *separate* hearsay objection remained insofar as their relevance depended on the truth of statements made in the documents: 'authentic' means the document is 'real,' not that its contents are necessarily 'true.'") (emphasis in original);*United States v. Bellucci*, 995 F.2d 157, 160 (9th Cir. 1993) ("Both the district court and the government in this case appeared to believe that the evidentiary rules dispensing with proof of authenticity, Federal Rules of Evidence 901-903, were sufficient to permit the admission of the evidence over a hearsay objection. The proponent of a writing at trial must overcome authentication, best evidence, *and* hearsay objections, however. The fact that a document may be self-authenticating does not render it admissible if it is hearsay in the absence of a recognized exception to the rule against hearsay.") (emphasis in original); *Fagiola v. National Gypsum Co.*, 906 F.2d 53, 58 (2d Cir. 1990) ("Because of the hearsay

rule, authentication as a genuine . . . document would not generally suffice to admit the contents of that document for its truth. . . . Although [the judge] went on to hold that the documents were authenticated under Rule 901(b)(3), (4), that ruling did not bring the contents of the documents within an exception to the hearsay rule."). Accordingly, the belatedly submitted evidence is not cognizable for purposes of staving off the instant summary-judgment motion.

The question remains whether, in the absence of the belatedly tendered evidence, the Krause Letter survives EMMC's hearsay challenge. I conclude that it does not. The key opinion expressed in the letter – that Brown's medical condition made it impossible for her to continue the functions of her job or arrive to work on time – is hearsay, *i.e.*, "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted[,]" Fed. R. Evid. 801(c); *see also, e.g., Capobianco v. City of New York*, 422 F.3d 47, 55 (2d Cir. 2005) ("As a general matter, it is correct that unsworn letters from physicians generally are inadmissible hearsay that are an insufficient basis for opposing a motion for summary judgment."); *McCleary v. National Cold Storage, Inc.*, 67 F. Supp.2d 1288, 1298 n.3 (D. Kan. 1999) ("Plainly offered for the improper hearsay purpose of the truth stated in them, the physicians' unsworn letters are rejected as improper grist for the summary judgment mill in this ADA case.").

Brown apparently does not contest EMMC's assertion that the Krause Letter does not fall within the hearsay exception created by Federal Rule of Evidence 803(4). *See* Plaintiff's Response to SMF Objections at [1]-[2]. In any event, I find that it does not. Rule 803(4) provides a hearsay exception for "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." Fed. R. Evid. 803(4). "In

general, under Rule 803(4), the declarant's motive to promote treatment or diagnosis is the factor crucial to reliability." *Bucci v. Essex Ins. Co*., 393 F.3d 285, 298 (1st Cir. 2005) (citation and internal quotation marks omitted); *see also, e.g., Gong v. Hirsch*, 913 F.2d 1269, 1273 (7th Cir. 1990) ("The rationale behind Rule 803(4) is that a patient's self-interest in promoting the cure of his own medical ailments guarantees the reliability of statements the patient makes for purposes of diagnosis or treatment."). As EMMC suggests, *see* Defendant's SMF Objections ¶ 95 – and regardless whether the "declarant" is conceptualized as Dr. Krause or Brown (the likely source of information about her tardiness to work and her termination therefrom) or a combination of the two – the statements in issue, which were made to attorney Young, apparently were not relayed for purposes of diagnosis or treatment. Indeed, Dr. Krause never told Brown that her connective-tissue disorder made it medically necessary for her to be late to work.

Brown seemingly does dispute EMMC's proposition that the Krause Letter does not qualify as a business record pursuant to Rule 803(6). *See* Plaintiff's Response to SMF Objections at [2]. However, her argument is predicated on non-cognizable, newly tendered evidence: notably, Dr. Krause's averment in his affidavit that he maintained the letter as part of Brown's medical records, *see* Krause Aff. ¶ 4. It therefore fails.

In any event, as EMMC suggests, *see* Defendant's SMF Objections ¶ 95, categorization of the Krause Letter as a business record for purposes of Rule 803(6) is problematic for other reasons. The Rule 803(6) exception pertains to memoranda, reports, records or data compilations "in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge[.]" Fed. R. Evid. 803(6). The critical acts or events addressed by Dr. Krause's letter are the incidents of tardiness that led to Brown's termination from EMMC. As EMMC argues, *see* Defendant's SMF Objections ¶ 95, Dr. Krause's opinion concerning Brown's work difficulties was not

recorded "at or near the time" of those incidents but rather some months later, *see Willco Kuwait (Trading) S.A.K. v. deSavary*, 843 F.2d 618, 628 (1st Cir. 1988) (telex that made reference to investigation and report that had occurred more than three months earlier was not made "at or near the time" of the events recorded and thus did not qualify as a business record pursuant to Rule 803(6)). In addition, as EMMC also posits, *see* Defendant's SMF Objections ¶ 95, it is questionable whether Dr. Krause qualifies as "a person with knowledge" for Rule 803(6) purposes. It is difficult to discern how Dr. Krause, who began treating Brown subsequent to her termination from EMMC, could have personal knowledge that her condition made it medically impossible for her to arrive to work on time for at least the year prior to her termination. *See Petrocelli v. Gallison*, 679 F.2d 286, 289-90 (1st Cir. 1982) (hospital record inadmissible under Rule 803(6) when it was unclear whether information contained within it originated from reporting doctors or from patient or his wife); *Bruneau v. Borden, Inc.*, 644 F. Supp. 894, 896 (D. Conn. 1986) (doctor's opinion, expressed in letter to attorney, that plaintiffs' health problems caused by exposure to urea-formaldehyde foam inadmissible pursuant to Rule 803(6) when, "[w]hile it would be of medical significance, both in diagnosis and treatment, that plaintiffs were exposed to formaldehyde, it is outside the field of medical concern for plaintiffs' diagnosis and/or treatment whether legal causation is established between the exposure and the physical condition. . . . [T]here is a serious question as to whether [Rule 803(6)] was intended to cover opinions given in relation to litigation.") (footnote omitted).

In sum, inasmuch as (i) a nonmovant such as Brown must "produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue" and therefore stave off summary judgment, *see Triangle Trading*, 200 F.3d at 2 (citation and internal punctuation omitted), and (ii) Brown has failed to adduce cognizable evidence supporting a critical element of her FMLA claim – namely, that she was entitled

to the disputed leave – summary judgment should be granted in EMMC's favor with respect to Brown's FMLA claim, set forth in Count I of the Complaint.

III. Conclusion

For the foregoing reasons, I recommend that EMMC's motion for summary judgment be **GRANTED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 9th day of July, 2007.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

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